

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN C. CUNNINGHAM

Claimant

VS.

LOVE BOX COMPANY LLC

Self-Insured Respondent

Docket No. 1,029,678

ORDER

STATEMENT OF THE CASE

Both respondent and claimant requested review of the January 9, 2009, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on April 17, 2009. Jim Lawing, of Wichita, Kansas, appeared for claimant. Jeffrey B. Hurt, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant suffered personal injury from an accident that arose out of and in the course of his employment with respondent. The ALJ found that claimant had a 20 percent functional impairment to the body as a whole. The ALJ further found that claimant was entitled to a work disability. He found that claimant had a 100 percent wage loss but did not sustain his burden of proving he had a task loss. In combining claimant's 100 percent wage loss with a 0 percent task loss, the ALJ found that claimant had a 50 percent permanent partial disability.

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board, the parties agreed that claimant's percentage of functional impairment was not an issue on appeal. Therefore, the Board affirms the ALJ's finding that claimant's impairment of function resulting from this accident is 20 percent.

ISSUES

Respondent contends the ALJ erred in finding that claimant had a 100 percent wage loss based on his being unemployed at the time of the regular hearing. Respondent argues that both Jerry Hardin and Steve Benjamin testified that claimant has the ability to earn wages performing sedentary work, but claimant made no effort to find a job within his restrictions. Respondent requests the Board find that claimant did not make a good faith

effort to find post-injury employment and impute an appropriate post-injury wage based on the expert testimony. Respondent requests that the ALJ's finding that claimant did not prove a task loss be affirmed. In the event the Board finds claimant did not make a good faith effort to find post-injury employment and finds the expert testimony of Mr. Benjamin to be the most credible, respondent asserts that claimant's work disability would be 14.1 percent based on a 28.2 percent wage loss as per Mr. Benjamin's opinion and a 0 percent task loss. In that event, claimant would be entitled to his functional disability only, as his work disability would be less than his 20 percent functional disability. In the alternative, respondent asks the Board to average the wage loss ratings of Mr. Benjamin and Mr. Hardin and find that claimant had a 40.1 percent wage loss which, combined with a 0 percent task loss, would compute to a 20.05 percent work disability.

Claimant argues that the ALJ's award of a 100 percent wage loss should be affirmed. Claimant, however, requests the Board find that he has an 80 percent task loss based on the testimony of Dr. Peter Bieri.

The issues for the Board's review are:

- (1) Is claimant entitled to a work disability?
- (2) Did claimant make a good faith effort to find post-injury employment and, if not, should a post-injury wage be imputed?
- (3) Did claimant prove a task loss?

FINDINGS OF FACT

Claimant worked for respondent as a shag driver. On March 29, 2005, when stepping out of his truck, he turned wrong and felt a sharp pain in his back. He continued to work until the morning of April 4, when he told respondent that he could not work any longer because he could not get up into and down from the truck. Respondent authorized medical treatment, and claimant had L3-L5 decompression surgery on his back on October 14, 2005.

Claimant was seen by Dr. Peter Bieri on August 28, 2006, at the request of his attorney. Claimant told Dr. Bieri that he had pain radiating from the low back into both lower extremities. On examination, Dr. Bieri found claimant had moderate tenderness to diffuse palpation. Active range of motion was moderately reduced to flexion and extension and was accompanied with a subjective increase in complaints of pain and brief, palpable muscle spasm and guarding. Dr. Bieri diagnosed claimant with lumbar strain and disc disease at two levels, along with spinal stenosis. He opined that claimant incurred injury to his low back during the course of his employment on or about March 29, 2005. Based

on the AMA *Guides*,¹ he rated claimant as being in DRE lumbosacral Category IV, a 20 percent permanent partial impairment.

Claimant was issued physical restrictions by Dr. Bieri consistent with a sedentary physical demand level. Dr. Bieri opined that claimant should lift no more than 10 pounds on an occasional basis with negligible frequent and constant lifting. Activities in the sedentary physical demand level are limited primarily to sitting or standing. Twisting, lifting, bending, crouching, crawling, or pulling are limited to no more than occasionally. Dr. Bieri further opined that claimant would be unable to return to work as an over-the-road driver. Although he did not specifically say that claimant would be unable to perform the job of a shag driver, he said that claimant would be unable to climb in and out of the trucks.

Dr. Bieri concluded that as a result of claimant's restrictions and impairment from his most recent injury, claimant had lost the ability to perform 80 percent of the job categories listed in Exhibit 9 to his deposition. He did not review a list of claimant's actual job tasks for the 15-year period before his injury in making this determination. Instead, he based his 80 percent opinion on a Dictionary of Occupational Titles chart of Physical Demand Characteristics of Work.² There were six categories on the chart, but for practical purposes he did not know that he had ever seen anyone whose work was at the very heavy physical level, so he only used the other five categories in his calculation. In essence, he placed claimant in the sedentary physical demand level. Since he believed claimant had lost the ability to perform the physical demands set out in four of the five categories utilized, he concluded claimant had an 80 percent task loss.

Jerry Hardin, a vocational rehabilitation consultant, met with claimant on October 24, 2006, at the request of claimant's attorney. He prepared a task list of the jobs claimant had performed in the 15-year period before his injury. This list included 14 unduplicated tasks claimant performed while working for three different employers.³

Mr. Hardin believed that more likely than not, claimant would not be able to obtain a full time job because of his restrictions. But, if claimant could get a post-injury job, his starting salary would be approximately \$7 per hour or \$280 per week. The highest paying job claimant could perform would be that of a dispatcher, if the employer would allow him to sit and stand at a comfort level. As a starting salary, that would be as much as \$8 to \$8.25 per hour, or a top of \$330 per week. Using the preinjury average weekly wage (AWW) of \$589.25, as was stipulated to by the parties, and an imputed wage of \$280,

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² Bieri Depo., Ex. 9.

³ This list was not presented to Dr. Bieri and no physician gave a task loss opinion using Mr. Hardin's task list.

claimant's wage loss would be 52 percent. Using an AWW of \$589.25 and an imputed wage of \$330, claimant's wage loss would be 44 percent.

Mr. Hardin did not ask claimant whether he had made a post-accident job search. He said that whether a person was making a reasonable effort to find a job was up to the court to decide.

Claimant met with Steve Benjamin, a vocational rehabilitation consultant, on January 22, 2007, at the request of respondent. Mr. Benjamin prepared a list of 21 unduplicated job tasks claimant had performed for three employers in the 15-year period before his accident of March 2005.⁴ He believes that claimant can reenter the labor market in the sedentary physical demand level. Because claimant had almost no transferrable skills, Mr. Benjamin opined a post-injury wage earning ability based on entry-level type employment. The only transferable job skills claimant had were those he used when he spent two to three months as a dispatcher for respondent.

Mr. Benjamin identified some jobs claimant would be able to perform and averaged the wages. The job in which claimant would be able to earn the highest wage would be as a dispatcher at \$624 per week. Mr. Benjamin said that in his opinion, claimant would be able to make more than entry level wages in this job because of his prior experience. He believed that even performing the job for two or three months would give claimant some of the skills and abilities to be able to do the job. Other jobs Mr. Benjamin thought claimant could perform would be those of a counter or rental clerk, hotel clerk, parking lot attendant and security/gate guard. Mr. Benjamin averaged the wages claimant could earn working in those positions and opined that claimant should be able to earn a weekly wage of \$422.96. Using the stipulated AWW of \$589.25, Mr. Benjamin computed claimant's loss of wage earning ability to be 28.2 percent. In making his calculations, Mr. Benjamin considered the Wichita metropolitan statistical area, which includes Butler, Harvey and Sedgwick counties. He did not perform a market labor survey so does not know how many jobs are available in the various categories of jobs he identified.

Claimant told Mr. Benjamin that he had not worked since his last day at respondent and that he had not applied for work. He was not registered at the local Workforce Development Center.

Claimant likewise admitted at the regular hearing that he had not sought any post-injury employment. His last full day at work for respondent was April 4, 2005. He testified that in June 2005, he returned to work for a few days, but he did not work full days. He said that he would not be able to perform the job tasks necessary to drive a truck. Also, he did not believe he would be able to perform the tasks of hotel clerk, security guard or dispatcher.

⁴ As with Mr. Hardin's task list, no physician gave an opinion or commented on claimant's current ability to perform these former job tasks.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "Burden of proof means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Foulk*,⁵ the Kansas Court of Appeals held:

The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system.

Later, in *Copeland*,⁶ the Court of Appeals stated:

⁵ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140, (1994), rev. denied 257 Kan. 1091 (1995).

⁶ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages can be made based on the actual wages.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.⁷

The Kansas Court of Appeals in *Watson*⁸ held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁹

ANALYSIS

Claimant is seeking an award of permanent partial disability compensation in excess of his percentage of functional impairment based upon the average of his wage loss and his task loss. In other words, claimant is seeking an award of work disability. Claimant has not worked since leaving his employment with respondent. He has no wages and, therefore, his actual wage loss is 100 percent. But the Kansas appellate courts have held that before an injured worker is entitled to his actual wage loss, he must first demonstrate that he made a good faith effort to find appropriate employment post injury. Claimant is unable to return to his former job of truck driving, and respondent did not offer claimant an accommodated job. Therefore, claimant was forced to seek employment in the open labor market. With his permanent restrictions and lack of formal education beyond high school, claimant was faced with a challenge. However, there are jobs that claimant possesses the physical ability to perform. And he has transferrable job skills that would be applicable to the position of a dispatcher. Despite this, claimant made no effort to find work.

⁷ *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 3, 9 P.3d 591 (2000).

⁸ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁹ *Id.* at Syl. ¶ 4.

Claimant argues that he is not capable of working full time in any capacity, but the greater weight of the medical and vocational evidence does not support this argument. The Board finds that claimant failed to demonstrate a good faith job search effort post-injury and, therefore, a wage will be imputed to him. The vocational experts place claimant's weekly wage earning ability post injury at between \$280 and \$624. Mr. Hardin believed \$280 to \$330 per week was realistic, whereas Mr. Benjamin believed the average of the wages claimant could expect to earn in the jobs available to him was approximately \$423. The Board finds claimant retains the capacity to earn \$330 per week. This wage will be imputed to him, and this results in his wage loss being 44 percent.

Claimant has failed to prove a task loss. K.S.A. 44-510e provides in part that permanent partial general disability is defined as the average of the wage loss and "the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident" The record does not contain such an opinion from a physician. The opinion by Dr. Bieri that claimant has lost the ability to perform 80 percent of the categories of work is an opinion that is neither specific to the jobs claimant actually worked at nor the actual tasks those jobs required claimant to perform. The statute does not define what constitutes a work task. But Dr. Bieri's 80 percent task loss opinion does not conform to the list of work tasks compiled by either vocational expert. It also fails to correspond with the jobs claimant has performed during the relevant 15 year period that preceded his accident. The actual tasks claimant performed in the jobs he worked at can be separated into each physical demand category for purposes of applying a physician's physical restrictions and coming up with a list of those tasks that claimant can still perform versus those that he cannot. But such an analysis was not done in this case by any physician. Therefore, the Board affirms the ALJ's finding that claimant failed to prove his task loss. This results in a finding of a 0 percent task loss which, when averaged with claimant's 44 percent wage loss, results in a 22 percent work disability.

CONCLUSION

(1) Claimant is entitled to a permanent partial general disability award based on a work disability.

(2) Claimant failed to make a good faith effort to find post-injury employment, and \$330 per week is an appropriate post-injury wage to be imputed.

(3) Claimant failed to prove a task loss.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee

be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 9, 2009, is modified to find that claimant has a 22 percent permanent partial general disability.

Claimant is entitled to 56.26 weeks of temporary total disability compensation at the rate of \$392.85 per week or \$22,101.74, followed by 82.22 weeks of permanent partial disability compensation at the rate of \$392.85 per week or \$32,300.13, for a 22 percent work disability, making a total award of \$54,401.87.

As of May 4, 2009, there would be due and owing to the claimant 56.26 weeks of temporary total disability compensation at the rate of \$392.85 per week in the sum of \$22,101.74, plus 82.22 weeks of permanent partial disability compensation at the rate of \$392.85 per week in the sum of \$32,300.13, for a total due and owing of \$54,401.87, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jim Lawing, Attorney for Claimant
Jeffrey B. Hurt, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge